

***United States Court of Appeals
for the Second Circuit***



PETITION

77-7010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ELLIE MARTELL,)
Plaintiff/Appellant)

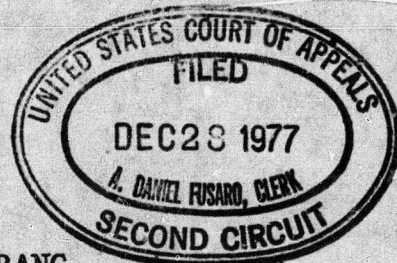
v.)

CBS, Inc., WCBS AM RADIO STATION,)
New York, New York,)

Defendant/Appellees.)

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Case No. 77-7010



PETITION FOR REHEARING IN BANC

The plaintiff/appellant Martell hereby petitions for Rehearing In Banc. Martell respectfully suggests that the three-judge panel, in deciding the attached Order of this Court filed December 9, 1977, appears to have overlooked the following points of law and fact and Martell being of the opinion that these proceedings involve a question of exceptional importance, therefore files this petition for Rehearing In Banc.

1. Martell appeared for oral argument before this Court on December 8, 1977 requesting that it overturn the ruling of Judge Owen (U.S. Dist. C., Southern D.) on grounds that Judge Owen had overlooked the basic and essential issue of her case.

2. The District Court had mistakenly said, "sounds in defamation" and erred in placing this case solely in the frame of libel which was only incidental

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to the basic issues which are easily identified as "journalistic negligence" which CBS's flagrantly negligent failure created a condition of affairs in which it was reasonably foreseeable that Martell would be deprived of her property, liberties and due process, etc., in violation of her protected rights under the United States Constitution.

3. The appellee CBS is a regulated company under Federal laws, enjoying the great gift from the people of the United States of the monopoly opportunity to broadcast to several states (licensed for interstate commerce) with high-powered facilities, over an exclusive channel in the radio spectrum. As such, CBS has a special responsibility not to be negligent where such negligence can foreseeably cause damage and injure ordinary citizens.

4. Martell submits that the proper frame of reference for this matter is Horstein vs. General Motors. In Horstein, the Court properly categorized it as a case of negligence and not defamation (Judge Whitman Knapp).

5. The broadcaster's (CBS) negligence here falls perfectly within the definition of "journalistic negligence" recently included in Time Inc. v. Firestone (U.S. Supreme Court 1976, 96 S.Ct. 958, 47 L.Ed.2d 154).

6. In the instant case, the broadcaster's negligent failure to verify easily verifiable facts of a broadcast aired on or about April 30, 1971 which was incalculably damaging to an ordinary citizen/^{Martell} and the damages

of WCBS's negligence, thus precludes summary judgment for the broadcaster CBS...as in Horstein v. Gen'l Motors.

7. As a direct result of WCBS's flagrant journalistic negligence Martell was caused to suffer incalculable damages including unlawful interference with her contracts and she was unlawfully forced to default on orders from the general public for her prominently publicized booklet (in the Washington Post and New York Post, etc.) entitled "Telephone First Aid" and unlawfully forced to default on her contractual obligations. In addition to prior restraint unlawfully imposed on her by CBS and other violations of Martell's First Amendment Rights guaranteed by the U.S. Constitution (Nebraska Press Assn. v. Stuart, 96 S.Ct.2791), Martell being a small publisher of booklets concerning news & matters of vital and current public interest, the plaintiff was caused to suffer unlawful deprivation of her liberties, property and due process etc., pain, mental anguish, anxiety, loss of valuable time, personal humiliation and default on other business, personal and moral obligations, contrary to CBS's assertions and footnotes in its Brief for Appellees, served on Oct. 26, 1977 (p. 4, etc.).

8. Unlike Morrison V. NBC, the plaintiff Martell is not seeking recovery for damages to her reputation. Rather, she asserts that the broadcaster's negligent failure created a condition of affairs in

which it was reasonably foreseeable she would be deprived
rights of
of her/property, liberties and due process, etc. that are
Federally protected. Damage to her reputation was but
one of many distinct consequences of the chain of events
initially set in motion by the broadcaster's negligence.

9. CBS may well argue that this is not an
FCC (Federal Communications Commission) matter, but
this does not license it to choose from several con-
ceivable interpretations the one most damaging to
Martell. The "Hit Job" perpetrated by CBS on an
ordinary citizen Martell was an outrageous abuse of
its franchise and an inexcusable violation of the FCC's
Personal Attack Rule CFR 73.123 having refused repeated
demands by Martell since the occurrence, with the burden
on CBS, for a copy of the tape/transcript of the broadcast
in question (on or about April 30, 1961). In addition,
Martell filed "Motion for Order Compelling Production
of Documents" with this Court.

10. Having chosen to follow this tack CBS
must be able to establish not merely that the item
broadcast was a conceivable or plausible interpretation
of alleged "news" but that the item was factually
correct.

11. In Gertz v. Welch Inc. it was made clear
that States could base awards on elements other than
injury to reputation, specifically listing "personal
humiliation" and mental anguish and suffering as ex-

examples of injuries which might be compensated consistently with the Constitution upon a showing of fault.

12. In *Time Inc. v. Firestone*, the U.S. Supreme Court cited a "flagrant example of journalistic negligence" (U.S. Supreme Ct. 1976, 96 S.Ct. 958, 47 L.Ed. 2d 154).

13. As has been found by recent decisions WCBS has a clear duty to verify the accuracy of its broadcasts (particularly when attacking the character of ordinary citizens) to about 3 million listeners during prime time, in a minimum of three states (NY, NJ and Conn.), just as in *Horstein*, General Motors had an obligation to assure that the plate (VIN) that it placed on its automobile, was the correct plate. As the ordinary media consumer relies on the licensed broadcaster for truthful broadcasts and not to perform negligently, *Horstein* relied upon General Motors to perform its duties, without being negligent.

14. Martell denies CBS's contention that "Martell admits WCBS's broadcast of April 30, 1971 was a (bona fide) news broadcast." CBS's statement to that effect before this Court during Oral Argument on December 8, 1977...is absolutely false.

15. CBS seeks to circumvent its clear duty under the FCC Personal Attack Rule to provide a tape/transcript to the person attacked shortly following the broadcast with the burden clearly upon the licensed broadcaster, CFR 73.123.

16. By no stretch of the imagination was said broadcast a bona fide news broadcast and WCBS has no statutory exemption nor is it in any manner, shape or form entitled to an exemption from its obligations under the FCC's Personal Attack Rule by making a self-interested self-judgment of a highly controversial broadcast which only the Courts can judge (as to its accuracy and being bona fide news).

17. CBS's shocking, off-handed remarks to this Court during oral argument on December 8, 1977 that (now) it might not be able to find Martell's tape is further proof of the broadcaster's negligence, even long after having been placed on notice that said tape may become part of an intended legal action, to be filed by Martell. This does not excuse WCBS from violating Federal laws and indeed makes it even more urgent for the Courts to grant "Motion for Order Compelling Production of Documents" required for Martell's Discovery Rights and for her proof of CBS's "flagrant negligence;" such proof being under the control of CBS despite Martell's demands since 1971. For reasons that even CBS is not above the laws, as a president of the USA is required to operate under the laws of the land, the Order of this Court dated December 9, 1977 should be reversed and Martell's case scheduled for trial.

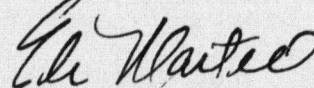
18. In order to save valuable time and the resources of the Courts and the parties concerned and particularly for Martell who is operating under

conditions of hardship in this case, Martell's "Motion for Order Compelling Production of Documents" dated November 1, 1977 should be granted, plus intermediate costs for plaintiff/appellant.

19. This Court is requested to use its full powers here, and nothing in the Constitution (prevents) any prohibition against such a (fault) finding being made in the first instance by an appellate rather than a trial court, (Time Inc. v. Firestone, S.Ct. 1976, 96 S.Ct. 958, 47 L.Ed. 2d 154.)

20. The Court is further requested to order that the entire proceedings before this Court including all papers, pleadings and oral arguments and any reports in the proceedings, be considered as a supplement to the record in this case.

Respectfully submitted,



ELLIE MARTELL

(appearing pro se)

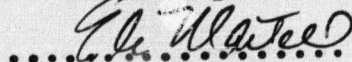
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Certificate of Service

I have today served 9 additional and revised copies via prepaid 1st Class Mail, plus 1 copy to Coudert Bros. of revised petition.



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Ellie Martell